Advanced Mechanical Corporation *and* Enterprise Association Metal Trades Branch of Local 638, United Association of Journeymen and Pipefitting Industry of the United States and Canada, AFL–CIO. Case 29–CA–17219

February 7, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

Upon a charge filed on March 15, 1993, by Enterprise Association Metal Trades Branch of Local 638, United Association of Journeymen and Pipefitting Industry of the United States and Canada, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on April 20, 1993, against Advanced Mechanical Corporation (the Respondent) alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On December 10, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On December 15, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that on October 13, 1993, the Region sent a letter notifying the Respondent that an answer had not been filed and that unless an answer was received by close of business on November 1, 1993, a Motion for Summary Judgment would be filed.[1]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] Although the Region's October 13, 1993 letter was returned by the Postal Service on November 2, 1993, with a notice that the Respondent had moved and left no forwarding address, the Respondent's failure to provide for appropriate service cannot serve to defeat the purposes of the Act. See *National Automatic Sprinklers*, 307 NLRB 481 fn. 1 (1992).

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a New York corporation, with its principal office and place of business located at 253 East Merrick Road, Village of Freeport, County of Nassau, State of New York, has been engaged in nonretail air conditioning, heating, and refrigeration installation and repair. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All refrigeration, air conditioning and oil burning maintenance and installation mechanics, employed by Respondent at its Freeport facility, excluding all other employees, business office clerical employees, guards and supervisors as defined by the Act.

At all times material, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period July 1, 1989, through June 30, 1992.

At all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The collective-bargaining agreement contains, inter alia, provisions requiring the Respondent to make monthly contributions on behalf of the unit employees to the Trustees of the Welfare Fund of the Metal Trades Branch Enterprise Association, Local Union

638, to the Trustees of the Metal Trades Branch, Local Union 638, Pension Fund, to the Service Fitters Industry Promotional Fund of New York, and to the Service Fitters Industry Educational Fund (the funds).

From in or about February 1992, until in or about September 1992, the Respondent failed and refused to comply with the provisions of the collective-bargaining agreement by failing to make contributions to the funds.

On or about September 19, 1992, the Union and the Respondent negotiated an agreement whereby the Respondent agreed to pay all monies due and owing to the funds, in four monthly installments and to extend the collective-bargaining agreement to October 31, 1992.

In or about October 1992, the Respondent failed and refused to comply with the provisions of the collective-bargaining agreement by failing to make current contributions to the funds.

In or about November 1992, the Respondent changed the terms and conditions of employment of its employees in the bargaining unit by ceasing to make any current payments to the funds, and since said date the Respondent has continued to fail and refuse to make such payments.

Since in or about December 1992, the Respondent has failed and refused to make the monthly retroactive fund payments required by its agreement with the Union.

The Respondent engaged in the conduct described above unilaterally and without bargaining with, or obtaining the agreement of, the Union.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to make required contributions to various benefit funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Mechanical Corporation, Freeport, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make required contributions to various benefit funds on behalf of employees in the following unit:

> All refrigeration, air conditioning and oil burning maintenance and installation mechanics, employed by Respondent at its Freeport facility, excluding all other employees, business office clerical employees, guards and supervisors as defined by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required contributions to the various benefit funds on behalf of the unit employees, and make the unit employees whole for any loss of benefits or expenses resulting from its unlawful failure to do so as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Freeport, New York, copies of the attached notice marked ''Appendix.''[3] Copies of

[2] Industry promotion and education funds are generally permissive subjects of bargaining for which no remedy would normally be warranted in this proceeding. See *Finger Lakes Plumbing & Heating Co*., 254 NLRB 1399 (1981), and cases cited there. However, as the record here fails to indicate the purpose(s) of the Service Fitters Industry Promotional and Educational Funds, we shall leave this issue to compliance.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to make required contributions to various benefit funds on behalf of employees in the following unit:

> All refrigeration, air conditioning and oil burning maintenance and installation mechanics, employed by us at our Freeport facility, excluding all other employees, business office clerical employees, guards and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all required contributions to the various benefit funds on behalf of unit employees, and WE WILL make the unit employees whole for any loss of benefits or expenses resulting from our unlawful failure to do so.

ADVANCED MECHANICAL CORPORATION